No. 92-8346

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

TERRY LEE SHANNON,
Petitioner

v.

UNITED STATES

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Was the Petitioner entitled to an instruction that if he was found not guilty solely by reason of insanity ("NGI"), he would be committed until he was no longer a threat to the safety of others or their property?

2. Was D.C. Code § 24-310 the model statute employed by Congress to draft that portion of the Insanity Defense Reform Act of 1984 ("IDRA") relevant to the questions presented by this case?

3. If so, did Congress intend that the Federal Courts applying the IDRA adopt the practice followed in the District of Columbia Circuit of instructing the jury on the disposition of the defendant in the event he was found NGI?

4. What rule should this Court adopt as most consistent with the purpose of the IDRA and the pursuit of justice regarding the grant of an instruction informing the jury that a defendant acquitted solely on the ground of insanity will be committed until such time as he is no longer a danger to others or their property?

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CITATION OF THE OPINION BELOW

The decision of the Court of Appeals for the Fifth Circuit in this case is reported as *United States v. Shannon*, 981 F.2d 759 (5th Cir. 1993). There is no other written opinion.

JURISDICTION

The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1).

This case originated in the United States District Court for the Northern District of Mississippi, Eastern Division, which asserted jurisdiction pursuant to 18 U.S.C. § 3231. The indictment charged Petitioner with the illegal possession of a firearm by a prior convicted felon (J.A. 1). Following entry of a judgment of conviction on April 22, 1992 (J.A. 12), the Petitioner later on that same date filed his notice of appeal to the United States Court of Appeals for the Fifth Circuit (R I, 133).[1]

The judgment of the District Court was affirmed by the Fifth Circuit on January 12, 1993. (J.A. 29). No petition for rehearing was filed. The Petitioner filed a Petition for Certiorari in this Court 90 days later on April 12, 1993.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Statutes involved in the case are as follows: The Insanity Defense Reform Act of 1984,[2] and D.C. Code § 24-301, which governs the insanity defense in the District of Columbia.[3]

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[1] References to the Record will be by volume number and page number, i.e. (R. I, 133).

[2] The IDRA consists of 18 U.S.C. §§ 17, 4241-4247, all of which are reproduced in full in Appendix A to this Brief.

[3] D.C. Code § 24-310 is reproduced in full in Appendix B to this Brief.

STATEMENT OF THE CASE

Statement of Proceedings in the District Court

The defendant was indicted for having possessed a firearm, being a prior convicted felon. The indictment charged that the defendant had been convicted of at least three prior felonies and was subject to the enhanced punishment of not less than fifteen years imprisonment, without probation or parole. (R. I, 1).

Arraignment was delayed while the defense obtained a psychological evaluation of the defendant. After the evaluation was concluded, the defense entered pleas of not guilty and not guilty by reason of insanity. (R. I, 13).

The Government then obtained an order to have the defendant evaluated (R. I, 26), and the report of the Government evaluation by Dr. Richard Ellis was completed and filed in the record. (R. I, 26).

The defense moved to have the defendant declared mentally incompetent to stand trial, but following a hearing the Court overruled this motion. (R. I, 57).

The case proceeded to trial on the defense of insanity. Two clinical psychologists testified, Dr. Ellis, the Government psychologist, and Dr. Roberts, the psychologist appointed for the defense.

At the close of the evidence, the Court instructed the jury on the defense of insanity (J.A. 9). The instruction, Number G-14, given at the request of the Government (R. II, 246-47), stated in general the elements of the defense and the petitioner's burden of proof in accordance with the IDRA. (J.A. 9).

The court refused to grant the defense any instruction on the disposition that would be made with the defendant under the IDRA in the event the jury found him NGI. (J.A. 22-28). The court grounded its refusal on what it viewed as the settled state of Fifth Circuit authority disapproving any such instruction. (J.A. 26-27).

Following the retirement of the jury to deliberate on its verdict, the foreperson sent the following note back to the court: "We want you to explain the reason of insanity." (J.A. 9). In response, the court simply reiterated its prior instruction, No. G-14. (J.A. 10).

The jury returned a verdict of guilty (J.A. 11) on which judgment was entered, and the Court sentenced the defendant to serve 15 years without the possibility of probation or parole. (J.A. 15).

Statement of Facts

In its case in chief at trial, the government submitted sufficient evidence, if believed by the jury, to prove beyond a reasonable doubt the following essential elements of the crime charged: (a) that the defendant Terry Lee Shannon did possess on August 25, 1990, within the boundaries of the Northern District of Mississippi a Sterling Arms .22 long rifle pistol, (b) that the pistol had moved in interstate commerce, and (c) that prior to possessing the pistol Terry Lee Shannon had been convicted of a felony crime punishable by a sentence of more than one year in prison. The principal issue for determination by the jury was the defense of insanity.

On the date alleged in the indictment, Sergeant Marvin Brown of the Tupelo, Mississippi Police Department stopped the defendant in the early morning hours while defendant was walking down a street. Upon being stopped, defendant walked across the street to the police car. After being told he would need to accompany the officer back to the station, the defendant told the officer he did not want to live anymore, whereupon he walked back across the street, reached inside his coat and pulled out a pistol with which he shot himself in the chest. In doing this the defendant did not threaten the officer by word or action. (R. II, 66-70). The indictment resulted from the defendant's possession of the pistol with which he shot himself.

The defendant had acquired the pistol earlier in the day from his son, with whom he had ridden in an automobile to the Tupelo airport in order for his son to catch an airplane back to New York. When defendant learned that his son intended to board the aircraft with the pistol, defendant took the pistol away from his son because he knew it was unlawful to go through airport security with a pistol, and he did not want his son to get into difficulty with the law. (R. II, 178, 189, 219).

After obtaining the pistol, defendant expressed his intention to others to deliver the pistol to his parole officer. He had previously had possession of a shotgun which he had delivered to his parole officer without adverse action being taken against him either by the State or Federal authorities. (R. II, 107-08).

In the early morning hours of August 25th, defendant left his girl friend's house walking down the street going to his mother's house. He believed he could safely leave the pistol at his mother's house until he could deliver it to his parole officer. (R. II, 142-43). Before he reached his mother's house, he was stopped and questioned by Sergeant Brown, resulting in defendant shooting himself and his arrest for the offense charged.

Dr. Ellis, an employee of the Bureau of Prisons, and Dr. Roberts, a local psychologist, both of whom held doctorate degrees in clinical psychology, testified regarding the defendant's mental condition at the time of the offense. Both witnesses agreed that the defendant suffered from a serious mental illness at the time of trial, at the time of the offense, and for some years before. (R. II, 188, 218). The witnesses differed about the precise nature of the diagnosis, Dr. Ellis having provisionally diagnosed organic delusional brain disorder (R. II, 88) and Dr. Roberts schizophrenia (R. II, 213).

Both witnesses agreed that at times the defendant suffered from paranoid delusions of a persecutory nature and

hallucinations, which became more likely when the defendant encountered a stressful situation. (R. II, 88, 216).

Dr. Ellis testified that his intellectual functioning was in the borderline range of mental retardation, and that his actual functioning was substantially below what would be expected from one with borderline retardation. (R. II, pp. 176-77).

Both psychological witnesses agreed that due to the defendant's chronic mental problems, he was an extreme suicide risk when under stress, his history indicating that he had made numerous suicide attempts in the past. (R. II, 190-192, 218). When confronted by Sergeant Brown, the defendant again attempted suicide, indicating the degree of stress the defendant was under at the time. (R. II, 191).

When not suffering from delusions or hallucinations, the defendant unquestionably knew as an abstract proposition that it was unlawful for him to possess a firearm. The question remained whether he appreciated the wrongfulness of his acts under the circumstances prevailing at the time of the alleged offense.

Dr. Ellis testified that in order to understand whether the defendant appreciated the wrongfulness of his conduct, one should consider the defendant's ability to comprehend his actions within three frames of moral reference: 1) the requirements of the law, 2) the standards of the defendant's community, and 3) the dictates of his own conscience. (R. II, 199). While apparently contradicting some of his earlier testimony, Dr. Ellis concluded his testimony by stating that from the defendant's perspective at the time, the defendant was complying with community and personal morality in taking possession of the pistol and protecting his son. (R. II, 205-06). The defendant was also doing what he felt was legally correct in trying to return the pistol to his parole officer via his mother. (R. II, 207).

BRIEF OF THE ARGUMENT

Prior to the passage of the Insanity Defense Reform Act of 1984, the law in the District of Columbia Circuit regarding the defense of not guilty by reason of insanity was very different than prevailed in all the other federal circuits. The District of Columbia Circuit was governed by a statute, D.C. Code § 24-310, which specifically provided for a not guilty verdict solely by reason of insanity, while in all the other circuits there was no such special verdict. D.C. Code § 24-310 provided for continuing judicial control over an accused acquitted because of insanity. The other federal circuits had no such protection.

With this background, Congress adopted IDRA and closely modeled its provisions and structure on the District of Columbia statute. While the defense is somewhat more difficult to assert successfully under IDRA than § 24-310, there is no doubt that § 24-310 is the parent of IDRA.

Under § 24-310 the settled construction of the statute at the time of the adoption of IDRA, and since, provided that the defendant had an absolute right at his option to instruct the jury that in the event of an NGI verdict, he would be committed to a mental hospital until such time as he no longer posed a risk to himself or others.

Under IDRA most circuits which have considered the question have refused to adopt the practice of the District of Columbia Circuit in permitting such an instruction, they are without the authority to do so, except in juries ordinarily have no concern with the disposition made by the court with an accused following the jury verdicts. They have also stated that in the absence of a plain Congressional directive to grant such an instruction. They have justified their positions by stating that certain unusual circumstances.

In so ruling, these courts have overlooked an established canon of statutory construction which holds that when a legislative body adopts a statute from another jurisdiction as its model, it is presumed in the absence of contrary evidence to have incorporated the authoritative and settled judicial construction placed on that statute.

This is especially true where as in the case of the IDRA, there is other evidence outside the statute which indicates that this was the legislative intent. The applicable legislative history in the case of the IDRA could not be clearer that the Senate Committee specifically referred to the existing practice in the District of Columbia with regard to the instruction in question and approved the practice.

With regard to the instruction in question, all available evidence makes it clear that Congress intended to incorporate the practice under § 24-310 into the IDRA.

ARGUMENT

This case turns on the interpertation and application of the Insanity Defense Reform Act of 1984 ("IDRA").[4] At trial the Petitioner asserted a defense of Not Guilty Soley by Reason of Insanity as provided for by 18 U.S.C. § 17. At the close of the evidence, by asking for and then obtaining from the Court the grant of Instruction G-14 (J.A. 9), the Government conceded that the Petitioner was entitled to present the defense of insanity to the jury. In connection with that defense Petitioner asserted a right to have the jury instructed that should the jury return an NGI verdict, he would be committed to a mental institution until such time as he no longer posed a danger to others or their property. (J.A. 22). The court refused to so instruct, and the case was submitted to the jury. During deliberations, the jury sent back a note stating,

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[4] Pub. L. No. 98-473, 98 Stat. 2057 (Codified at 18 U.S.C. §§ 17, 4241-4247 (1988) (attached to this Brief as Appendix A).

"We want you to explain the reason of insanity." (J.A. 9). The court simply reiterated its previously granted instruction on insanity. (J.A. 10). Petitioner was later convicted. The Fifth Circuit affirmed the conviction. (J.A. 29).

I. PRE-IDRA LAW IN THE CIRCUITS OTHER THAN THE D.C. CIRCUIT [5]

Before passage of the IDRA, the defense of insanity was a matter of federal common law except in the District of Columbia. There was no provision for a special verdict of not guilty by reason of insanity ("NGI") and no provision for any continuing federal jurisdiction over a defendant acquitted on the ground of insanity. *United States v. Borum,* 464 F.2d 896 (10th Cir. 1972). In the event of acquittal because of insanity, the only recourse for the government was to persuade the appropriate authorities of the State jurisdiction to institute commitment proceedings. *United States v. McCracken,* 488 F.2d 406 (5th Cir. 1974).

The burden of proof on the issue of sanity was on the government. If the defendant was able to present sufficient evidence to raise the question of insanity, the government was required to prove the defendant's sanity beyond a reasonable doubt. The prevailing view in all the Circuits, including the D.C. Circuit, on the test for insanity was the ALI test which provided that a defendant was entitled to acquittal if because of a substantial mental disease or defect he was unable to appreciate the wrongfulness of his acts or was unable to conform his conduct to the requirements of the law. *United States v. Brawner,* 471 F.2d 969, 971 (D.C. Cir. 1972).

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[5] Note, "Federal Jury Instructions and the Consequences of a Successful Insanity Defense," 93 Colum. L. Rev. 1223 (1993) contains a concise overview of both the pre-IDRA and post-IDRA law.

II. THE LAW IN THE DISTRICT OF COLUMBIA

The law in the District of Columbia on the defense of insanity pre-IDRA was considerably different than that in the other Circuits. Congress had adopted a statute which established the NGI verdict and provided for commitment of the defendant in the event of acquittal on the ground of insanity. *See,* D.C. Code § 24-301 (1989).[6]

That statute was authoritatively construed in *Lyles v. United States,* 254 F.2d 725 (D.C. Cir. 1957), *cert. denied,* 356 U.S. 961 (1958). In *Lyles* the court held, *inter alia,* that on the issue of insanity a defendant was entitled to have the jury instructed, if he so requested, that in the event of a verdict of not guilty by reason of insanity he would be committed to a mental institution until such time as he was no longer a danger to the public. The court specifically pretermitted any decision on the form that instruction should take. 254 F.2d at 728.

In *United States v. Brawner,* 471 F.2d 969 (D.C. Cir. 1972), the court explained the *Lyles* decision and *Bolton v. Harris,* 130 U.S. App. D.C. 1, 395 F.2d 642 (1968), in light of amendments to D.C. Code § 24-301 subsequent to *Lyles.* The court suggested the following form of instruction as appropriate to effectuate the rule in *Lyles*:

> If the defendant is found not guilty by reason of insanity, it becomes the duty of the court to commit him to St. Elizabeths Hospital. There will be a hearing within 50 days to determine whether defendant is entitled to release. In that hearing the defendant has the burden of proof. The defendant will remain in custody, and will be entitled to release from custody only if the court finds by preponderance of the evidence that he is not likely to injure himself or other persons due to mental illness.

471 F.2d at 997-98.

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[6] The present form of the statute is Appendix B to this Brief.

Brawner also noted that by an amendment to D.C. Code § 24-301 in 1970, the burden of proof to establish the defense was shifted to the defendant. 471 F.2d at 998, n. 51.

After *Brawner*, the pertinent law on the insanity defense in the District of Columbia might be summarized as follows: 1) The defense of not guilty solely by reason of insanity was statutorily recognized; 2) the jury determined the validity of the defense in accord with the ALI test; 3) the burden of proof was on the defendant to establish the defense by a preponderance of the evidence; 4) at the option of the defendant, he could have the jury instructed in accordance with the form of instruction set forth in *Brawner*; and 5) if successful, the defendant was committed to a mental institution until such time as he could judicially establish that he no longer posed a danger to himself or others.[7]

III. PASSAGE OF THE IDRA

With the federal law of insanity in the state set forth above, the Congress enacted IDRA. In doing so, it selected as its model D.C. Code § 24-301. *United States v. Crutchfield*, 893 F.2d 376, 378 (D.C. Cir. 1990).

IDRA provided for a special verdict of not guilty solely by reason of insanity; 2) it abandoned the ALI standard and returned to the M'Naughton rule; 3) the burden of proof was placed on the defendant to establish the defense by clear and convincing evidence; and 4) if successful, the defendant was committed to a mental institution until such time as he could judicially establish that he no longer posed a danger to others or the property of others. *See*, Appendix A.

[7] If certified sane and harmless by the superintendent of the institution where confined following acquittal, the defendant could be released without a hearing, but only if neither the court nor the government called for a hearing within 15 days of the filing of the superintendent's certificate. D.C. Code § 24-301(e).

While the IDRA adopted certain substantive changes which made the insanity defense more difficult to successfully assert, (i.e., increasing the burden of proof from a preponderance of the evidence to clear and convincing evidence and abandoning the ALI standard), the IDRA as adopted closely followed the statutory scheme and language of D.C. Code § 24-301. This is especially true for the procedural scheme by which the defense is asserted and successful defendants dealt with following their acquittal solely on the ground of insanity.

In contrasting the state of the law in the District of Columbia to that in the other circuits, the legislative history on the IDRA specifically cites the instruction approved in *Brawner* as an appropriate practice:

> "The Committee endorses the procedure used in the District of Columbia whereby the jury, in a case in which the insanity defense has been raised, may be instructed on the effect of a verdict of not guilty by reason of insanity. (footnote omitted). If the defendant requests that the instruction not be given, it is within the discretion of the court whether to give it or not." (footnote omitted).[8]

IV. THE DECISION OF THE FIFTH CIRCUIT IN SHANNON v. UNITED STATES[9] AND THE POSITIONS OF THE OTHER CIRCUITS ON THE ISSUE

In affirming Petitioner's conviction, the Fifth Circuit relied primarily on the general principle that juries have no sentencing or punishment function and that Congress expressed no intent in the IDRA to alter that general principle. The court emphasized the following decisions in supporting its decision: *Rogers v. United States*, 422

[8] Appendix C contains the quoted excerpt plus additional material, including the footnotes in the Report which cite directly to the *Brawner* decision and D.C. Pattern Instruction 5.11 which is on point.

[9] 981 F.2d 759 (5th Cir. 1993), *cert. granted* November 1, 1993, No. 92-8346, —— U.S. —— (1993).

U.S. 35, 95 S. Ct. 2091, 45 L.Ed.2d 1 (1975), *United States v. Frank,* 956 F.2d 872 (9th Cir. 1992), cert. denied 113 S. Ct. 363 (1992) (Stevens, J. writing opinion respecting the denial of cert.), and *United States v. McCracken,* 488 F.2d 406 (5th Cir. 1974). The court concluded its opinion as follows:

> "We adhere to our established precedents since there is no statutory directive that opens up to juries a role in the assessment or determination of penalties. We properly are concerned about possible unfortunate consequences of any alteration of the traditional role of the jury. We are convinced that a carefully limited and precise statutory mandate must be required. There is none here."

981 F.2d at 765.

The *Rogers* case only holds that under the statute there at issue the jury had no sentencing function. It does not hold that Congress cannot and has never provided such a role for the jury. For example, in federal capital cases Congress provided that the jury would be directly involved in the punishment decision. 18 U.S.C. § 1111. That part of the statute has been declared unconstitutional but not because Congress could not constitutionally authorize a jury to participate in the sentencing process. The statute has so far not been amended by Congress and remains under constitutional infirmity. *United States v. Goseyun,* 789 F.2d 1386 (9th Cir. 1986). However, it is submitted that no authority suggests that Congress is constitutionally forbidden to grant the jury a role in sentencing if it elects to do so. *See,* C. Murphy, "Integrating the Constitutional Authority of Civil and Criminal Juries," 61 Geo. Wash. L. Rev. 723, 781 *et seq.* (1993). By the same token, if Congress intended for juries to be instructed regarding the disposition of accused persons following an NGI verdict, it could certainly do so.

But what is more to the point, allowing the jury to know what will happen to the defendant in the event of

an insanity verdict does not give the jury any role in sentencing or punishment. It simply gives them the same information about the insanity verdict that they already possess from common knowledge about the verdicts of guilty and not guilty. *Lyles v. United States,* 254 F.2d 725 (D.C. Cir. 1957), *cert. denied,* 356 U.S. 961 (1958); *United States v. Blume,* 967 F.2d 45 (2d Cir. 1992) (J. Newman concurring).

McCracken, which was cited by the Fifth Circuit in its opinion in this case, is authority for both sides of the argument. *McCracken* praises the reasoning in *Lyles,* while excoriating Congress for not providing a commitment procedure similar to that then found in the District of Columbia. It especially approves of the argument that if juries are not informed of the mandatory comitment of a defendant acquitted because of insanity, many juries will simply convict the defendant out of fear that their NGI verdict would endanger their fellow citizens by the defendant's immediate return to the public.

Shannon establishes that in the Fifth Circuit, IDRA did not work any change whatever in the law regarding the propriety of such an instruction, and absent unusual circumstances such as were present in *McCracken,* the trial court is not permitted to grant such an instruction.

The position of the Ninth Circuit is expressed in *United States v. Frank,* 956 F.2d 872 (9th Cir. 1992), cert. denied 113 S. Ct. 363 (1992). It is essentially the same as that of the Fifth Circuit. In noting the legislative history quoted earlier in this brief, the court stated:

> This statement does not have the force of law nor does it purport to interpret or explain ambiguous language in the statute regarding jury instructions. (citation omitted).

956 F.2d at 881.

The court in *Shannon* also relied on this language from *Frank* to dismiss the statutory construction argument of

the Petitioner. 981 F.2d at 763. This position on the proper interpretation of the statute at issue takes too narrow a view of the effect of the statutory history in this case. While in this case the statutory history, in and of itself, may not determine the meaning of the statute, when Congress uses a statute with a settled interpretation as a model for a subsequent Congressional enactment, it adopts not only the statute itself, but the settled judicial interpretation placed on that statute. *E.g., Capital Traction Co. v. Hof,* 174 U.S. 1, 36, 19 S. Ct. 580, 43 L.Ed. 873 (1899). As established above, the D.C. statute and practice were the model for IDRA, and the settled judicial construction placed on D.C. Code § 24-301 was incorporated into the IDRA when enacted. This argument will be developed more fully below.

The position of the Eleventh Circuit is expressed in *United States v. Thigpen,* 4 F.3d 1573 (11th Cir. 1993). It is also essentially the position of the Fifth Circuit. It relies on *McCracken* as controlling authority, with one additional element:

> "[W]e direct district courts to specifically instruct juries not to consider the consequences of a not guilty by reason of insanity verdict when that defense is presented."

4 F.3d at 1578.

This instruction is based on the familiar presumption that juries follow the instructions of the court. While such a presumption is essential to the judicial process as followed in this country, it is not wise to extend it beyond its necessary limits. Human experience tells us that one of the quickest ways to arouse another's curiosity is to inform him that he need not be concerned with a particular matter. The myth of Pandora's Box well illustrates the effect of such injunctions.

An argument of long standing against the rule as expressed in *Shannon* is that in the absence of information,

many jurors will speculate on the disposition which will be made of the defendant should an NGI be returned. The rule in the Eleventh Circuit is especially prejudicial to defendants because it draws special attention to an issue on which the jury is kept in ignorance. Under such an instruction, some jurors will no doubt speculate that the reason for the court's injunction is that the defendant will walk free if acquitted on the ground of insanity, and the court is simply trying to conceal the fact.

The Second Circuit in *United States v. Blume,* 967 F.2d 45 (2d Cir. 1992) reached a substantially different result than the previously discussed circuits. However, there was no majority opinion on the panel, and three separate opinions resulted. Both Judge Lumbard and Judge Newman agreed that the instruction was proper at least in some circumstances, but disagreed on whether it was a matter of the judge's discretion or the defendant's right. Both Judge Lumbard and Judge Newman were influenced by the legislative history and Judge Newman also by the reasoning in *United States v. Neavill,* 868 F.2d 1000 (8th Cir.), vacated upon grant of reh'g en banc, 877 F.2d 1394 (8th Cir.), appeal dismissed at defendant's request, 886 F.2d 220 (8th Cir. 1989) (en banc), discussed *infra* and *Lyles.* The court found no abuse of discretion in the trial court's refusal of the instruction, and the conviction was affirmed.

Judge Newman's concurring opinion summarized the position of the panel as follows:

> On the most significant issue raised by this appeal —whether a jury should be instructed as to the consequences of a verdict of not guilty by reason of insanity—the panel is divided three ways. I believe the instruction should always be given unless the defendant prefers its omission. Judge Winter believes the instruction should normally not be given. Judge Lumbard believes that the decision whether to give the instruction should be left to the discretion of the

> trial judge. We are in agreement, however, that the omission of the instruction in this case does not require reversal of the conviction. I share that conclusion because I am satisfied that the omission of the requested instruction was harmless error. Though the panel is unanimous in its disposition of this appeal, its division on the issue of giving the requested instruction, if left unresolved, leaves the law of this Circuit unclear." (footnote omitted).

967 F.2d at 50.

Two considerations primarily influenced Judge Newman's reasoning. First, the instruction could be communicated "quickly and clearly in a brief sentence, without burdening the jurors with the details of the commitment procedure," 967 F.2d at 52 and would minimize the likelihood of an unjust conviction by a jury seeking only to avoid the release of a potentially dangerous mental patient. Second, the legislative history indicated that Congress intended to adopt the practice of granting the instruction as followed in the District of Columbia Circuit, which was not discretionary but mandatory if the defendant requested it.

Judge Winter, who also concurred in the result, wrote that in his opinion the instruction should rarely be given, but agreed that in occasional cases it would be appropriate, for example where there was some suggestion in the record that the defendant might go free if acquitted because of insanity. He nevertheless agreed with Judge Newman that the Senate Report clearly stated that the instruction should be given and did not leave it to the discretion of the court. He simply felt that the statement in the committee report had no effect because, "the statute itself lacks any relevant provision." *But see, Capital Traction Co.* and other cases gathered *infra.*

The Third Circuit recently decided the case of *United States v. Fisher,* —— F.3d ——, 1993 U.S. App. Lexis

29048 (3d Cir. 1993). The court expressed its holding as follows:

> "We agree that this type of instruction may be a useful antidote when the trial judge has some basis for concluding that the jury might otherwise be improperly influenced by a false belief concerning the consequences of an NGI verdict. At the same time, however, we believe that this antidote should be administered with care and on a case-by-case basis."

1993 U.S. App. Lexis 29048, 21.

Of the previously discussed decisions, the *Fisher* Court's holding is most like Judge Lumbard's opinion in *Blume.* The instruction is not prohibited, but the trial judge should exercise a guarded discretion in granting it.

In *United States v. Neavill,* 868 F.2d 1000 (8th Cir.), vacated upon grant of reh'g en banc, 877 F.2d 1394 (8th Cir.), appeal dismissed at defendant's request, 886 F.2d 220 (8th Cir. 1989) (en banc), a panel of the Eighth Circuit found that the IDRA permitted it to reexamine former precedent in that circuit and adopt the position that the jury should be instructed that the defendant would be committed in the event of an insanity finding. The *Neavill* court was persuaded that the legislative history mandated rejecting prior circuit authority and adopting the position of the D.C. Circuit as expressed in *Lyles.* 868 F.2d at 1004, n. 8. The panel decision was later vacated by operation of law when an *en banc* rehearing was granted, and the appeal was later dismissed by the defendant so the Eighth Circuit *en banc* never reconsidered *Neavill.* Nevertheless the opinion has had some influence, as is attested by its citation by Judge Newman in *Blume.*

In *United States v. Pryor,* 960 F.2d 1 (1st Cir. 1992), at the request of the defendant, the trial court granted an instruction on the possible disposition of the defendant in the event of an NGI verdict, but added to it, apparently

over the defendant's objection, that the confinement might only last 40 days. The opinion does not set forth the language of the instruction requested by the defense, nor the charge as actually given after amendment by the trial court. It is impossible to tell from the opinion what the court's position would have been had the trial court ruled that the defendant was not entitled to any instruction on the point.

V. BY ADOPTING D.C. CODE § 24-310 AS ITS MODEL AND FOLLOWING THAT MODEL AS CLOSELY AS IT DID, CONGRESS INCORPORATED THE AUTHORITATIVE CONSTRUCTION OF *LYLES* AND *BRAWNER* INTO IDRA

In *Cathcart v. Robinson*, 5 Pet. (30 U.S.) 263, 8 L.Ed. 120 (1831) Justice Marshall wrote the opinion for the Court. One of the issues involved an alleged fraudulent conveyance and the effect of the English decisions construing the Statute of 27 Elizabeth on that issue. The Court held as follows:

> The statute of Elizabeth is in force in this district. The rule, which has been uniformly observed by this court in construing statutes, is to adopt the construction made by the courts of the country by whose legislature the statute was enacted. This rule may be susceptible of some modification, when applied to British statutes which are adopted in any of these states. By adopting them they become our own as entirely as if they had been enacted by the legislature of the state. The received construction in England at the time they are admitted to operate in this country, indeed to the time of our separation from the British empire, may very properly be considered as accompanying the statutes themselves, and forming an integral part of them."

30 U.S. at 280.

The Court then determined that at the time of the adoption of 27 Elizabeth, the English decisions held that

a strong but rebuttable presumption existed of fraud under the facts of the case under consideration. There being no circumstances to overcome the presumption, the Court decided that the presumption of fraud must prevail in accordance with the rule established by the English decisions.

In *Capital Traction Co. v. Hof*, 174 U.S. 1, 19 S. Ct. 580, 43 L.Ed. 873 (1899) this Court was seeking to discover the effect of a statute adopted by Congress on March 1, 1823, which broadened the jurisdiction of Justices of the Peace in the District of Columbia. In part the Act provided for a trial by jury before a Justice of the Peace. In such event, any party aggrieved could appeal to the Circuit Court and obtain another jury trial. The question was thus presented whether under the 7th Amendment, the procedure providing for the possibility of two jury trials in succession was unconstitutional as permitting a fact once determined by a jury to be reexamined other than as permitted by the common law.

The Court decided the question by first determining that the dual jury trial provision had come from a New York statute originally enacted in 1801. It then determined the authoritative construction placed on the statute by the New York courts prior to the adoption of the statute by the District of Columbia in 1823. The New York courts had held that the jury provided for by the Act were judges of both the facts and the law, and that the Justice of the Peace had no authority to arrest the judgment or order a new trial, but must immediately enter judgment on whatever verdict the jury rendered. The Court then stated:

> "By a familiar canon of interpretation, heretofore applied by this court whenever congress, in legislating for the District of Columbia, has borrowed from the statutes of a state provisions which had received in that state a known and settled construction before their enactment by congress, that construction must

be deemed to have been adopted by congress together with the text which it expounded, and the provisions must be construed as they were understood at the time in the state." (citations omitted).

174 U.S. at 36.

The Court then applied the rule of the New York decisions and held that such a jury was not a jury within the meaning of the 7th Amendment since no such jury was known to the common law. Consequently it was not a breach of the 7th Amendment under the procedures in question to provide for a second jury trial on appeal.

Commenting on the strength and nature of this principle in *Carolene Products Co. v. United States*, 323 U.S. 18, 65 S. Ct. 1, 89 L.Ed. 15 (1944), the Court made the following statement:

> "It [the principle of incorporation of authoritative judicial construction] is a presumption of legislative intention, however, which varies in strength with the similarity of the language, the established character of the decisions in the jurisdiction from which the language was adopted and the presence or lack of other indicia of intention. (citations omitted). 323 U.S. at 26. *Accord, Yates v. United States*, 354 U.S. 298, 77 S. Ct. 1064, 1 L.Ed. 2d 1356 (1957), *criticized on other grounds, Griffin v. United States*, 502 U.S. ——, 112 S. Ct. 466, 116 L.Ed.2d 371 (1991); *cf., Evans v. United States*, 504 U.S. ——, 112 S. Ct. ——, 119 L.E.2d 57 (1992).

The argument previously established that Congress employed D.C. Code § 24-310 as its model statute for the IDRA. The decisions construing § 24-310 were quite clear (i.e., *Lyles* and *Brawner*), and Congress was well aware of them.[10] The Senate Report demonstrates that

[10] In the excerpt from the Senate Report which is reproduced in Appendix C to this Brief, the Committee specifically cites *Brawner* in reference to the instruction in that case informing the jury of the consequences of an NGI verdict. In another footnote to Appendix C, the Committee quotes D.C. Circuit Pattern Jury Instruction 5.11 which is the form of instruction suggested by *Brawner*.

Congress was aware of the interpretation placed on D.C. Code § 24-310 by *Lyles* and *Brawner*, and is a prime example of the "other indicia of intention" referred to in *Carolene Products Co.*

IDRA is not ambiguous on the issue of the instruction in question; it is silent, just as is its model statute, D.C. Code § 24-310. There is nothing about the text of IDRA itself, divorced from the context in which it was drafted and enacted, which suggests either that the instruction at issue ought, or ought not, be given. The incorporation of the *Lyles* and *Brawner* holdings on instructing NGI juries into the IDRA in no way contradicts the language of the statute or is otherwise inconsistent with its intent and purpose.

The emphasis placed on the absence of a specific provision regarding the instruction in IDRA by some of the circuit court decisions, for example *Shannon*, is difficult to understand. In providing for the judicial procedure by which a particular right or remedy will be enforced, Congress does not ordinarily go so far as to prescribe for the courts specific forms of jury instructions. This is especially true in a case such as this where the statute Congress used as a model contained no such provision.

Congress is largely a body of lawyers and is presumed to know the law. *Albernaz v. United States*, 450 U.S. 333, 101 S. Ct. 1137, 67 L.Ed. 2d 275 (1981). That would include the judicial construction placed on D.C. Code § 24-310. This presumption is borne out by the specificity with which the Senate Committee endorsed the procedure followed in the District of Columbia regarding instructing juries on the consequences of NGI verdicts.

Under *Cathcart, Capital Traction Co., Carolene Products Co.*, and *Yates*, Congress incorporated into the

IDRA the authoritative holdings of *Lyles* and *Brawner* regarding instructing a jury on the consequences of an NGI verdict. This is supported not only by the interpretive presumptions explained above, but by all that can be gleaned from the statutory history on the subject.

To the extent that there is doubt about Congress' intention regarding the issue under discussion, which Petitioner suggests is minimal in view of the foregoing argument, by analogy to the rule of lenity, that doubt ought to be resolved in favor of the position which provides the accused with the more expansive procedural right. *cf., Bifulco v. United States,* 447 U.S. 381, 100 S. Ct. 2247, 65 L.Ed.2d 205 (1980); *United States v. Denny-Shaffer,* 2 F.3d 999 (10th Cir. 1993).

VI. WHAT SPECIFIC RULE SHOULD THIS COURT ADOPT?

This case should be reversed and remanded for a new trial. This Court should further declare that the decisions in *Lyles* and *Brawner*, to the extent they deal with the issue presented in this case and do not conflict with the terms of IDRA, were incorporated with the adoption of IDRA, and a defendant asserting the NGI defense is entitled as a matter of right to an instruction, at his option, instructing the jury on the consequences of an NGI verdict.

In addition to the instruction from *Brawner* quoted at page 9, other forms of suggested instruction are attached as Appendices to this Brief.[11] In accordance with the doctrine that Congress adopts the settled judicial construction of a statute which it employs as a model, the instruction in *Brawner*, which is also the basis of D.C. Circuit Pattern Instruction 5.11 (3d Ed. 1978) and 5.10 (4th Ed. 1993)[12], should be the basis for the draft of

[11] See Appendix D, E, F, G, and H.

[12] Appendices D and E.

an appropriate instruction under IDRA. An instruction under the IDRA modeled on *Brawner* would read as follows:

> If the defendant is found not guilty solely by reason of insanity, it becomes the duty of the court to commit him to an appropriate mental institution. There will be a hearing within 40 days to determine whether defendant is entitled to release. In that hearing the defendant has the burden of proof. The defendant will remain in custody, and will be entitled to release from custody only if the court finds by clear and convincing evidence that he is not likely to injure other persons or the property of others due to mental illness.

Despite the fact that strict adherence to doctrine would enjoin the use of *Brawner* as the sole model, the position of Judge Newman in *Blume* has the virtue of simplicity of language and ease of use. An instruction such as contemplated by Judge Newman would entail only a slight departure from the form suggested by *Brawner* and might read as follows:

> If the defendant is found not guilty solely by reason of insanity, it becomes the duty of the court to commit him to an appropriate mental institution until such time, if any, as the Court finds he is not likely to injure other persons or the property of others due to mental illness.

CONCLUSION

For the reasons stated, the Petitioner respectfully requests that the judgment be reversed and the matter remanded for a new trial.

Respectfully submitted,

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APPENDICES

APPENDIX A

Insanity Defense Reform Act of 1984

§ 17. Insanity defense

(a) Affirmative defense.—It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

(b) Burden of proof.—The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

(Added Oct. 12, 1984, P.L. 98-473, Title II, Ch IV, § 402(a), 98 Stat. 2057; Nov. 10, 1986, P.L. 99-646, § 34(a), 100 Stat. 3599.)

§ 4241. Determination of mental competency to stand trial

(a) Motion to determine competency of defendant.—At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

(b) Psychiatric or psychological examination and report.—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(c) Hearing.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) Determination and disposition.—If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility—

(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed; and

(2) for an additional reasonable period of time until—

(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the trial to proceed; or

(B) the pending charges against him are disposed of according to law;

whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the trial to proceed, the defendant is subject to the provisions of section 4246.

(e) Discharge.—When the director of the facility in which a defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered to such an extent that he is able to understand the nature and

consequences of the proceedings against him and to assist properly in his defense, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the Government. The court shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine the competency of the defendant. If, after the hearing, the court finds by a preponderance of the evidence that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, the court shall order his immediate discharge from the facility in which he is hospitalized and shall set the date for trial. Upon discharge, the defendant is subject to the provisions of chapter 207.

(f) Admissibility of finding of competency.—A finding by the court that the defendant is mentally competent to stand trial shall not prejudice the defendant in raising the issue of his insanity as a defense to the offense charged, and shall not be admissible as evidence in a trial for the offense charged.

(As amended Oct. 12, 1984, Pub.L. 98-473, Title II, § 403(a), 98 Stat. 2057.)

§ 4242. Determination of the existence of insanity at the time of the offense

(a) Motion for pretrial psychiatric or psychological examination.—Upon the filing of a notice, as provided in Rule 12.2 of the Federal Rules of Criminal Procedure, that the defendant intends to rely on the defense of insanity, the court, upon motion of the attorney for the Government, shall order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(b) Special verdict.—If the issue of insanity is raised by notice as provided in Rule 12.2 of the Federal Rules

of Criminal Procedure on motion of the defendant or of the attorney for the Government, or on the court's own motion, the jury shall be instructed to find, or, in the event of a nonjury trial, the court shall find the defendant—

(1) guilty;

(2) not guilty; or

(3) not guilty only by reason of insanity.

(As amended Oct. 12, 1984, Pub.L. 93-473, Title II, § 403(a), 98 Stat. 2059.)

§ 4243. Hospitalization of a person found not guilty only by reason of insanity

(a) Determination of present mental condition of acquitted person.—If a person is found not guilty only by reason of insanity at the time of the offense charged, he shall be committed to a suitable facility until such time as he is eligible for release pursuant to subsection (e).

(b) Psychiatric or psychological examination and report.—Prior to the date of the hearing, pursuant to subsection (c), the court shall order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(c) Hearing.—A hearing shall be conducted pursuant to the provisions of section 4247(d) and shall take place not later than forty days following the special verdict.

(d) Burden of proof.—In a hearing pursuant to subsection (c) of this section, a person found not guilty only by reason of insanity of an offense involving bodily injury to, or serious damage to the property of, another person, or involving a substantial risk of such injury or damage, has the burden of proving by clear and convincing evidence that his release would not create a substantial risk of bodily injury to another person or serious damage of

property of another due to a present mental disease or defect. With respect to any other offense, the person has the burden of such proof by a preponderance of the evidence.

(e) Determination and disposition.—If, after the hearing, the court fails to find by the standard specified in subsection (d) of this section that the person's release would not create a substantial risk of bodily injury to another person or serious damage of property of another due to a present mental disease or defect, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall hospitalize the person for treatment in a suitable facility until—

(1) such a State will assume such responsibility; or

(2) the person's mental condition is such that his release, or his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment, would not create a substantial risk of bodily injury to another person or serious damage to property of another;

whichever is earlier. The Attorney General shall continue periodically to exert all reasonable efforts to cause such a State to assume such responsibility for the person's custody, care, and treatment.

(f) Discharge.—When the director of the facility in which an acquitted person is hospitalized pursuant to subsection (e) determines that the person has recovered from his mental disease or defect to such an extent that his

release, or his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment, would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the person's counsel and to the attorney for the Government. The court shall order the discharge of the acquitted person or, on the motion of the attorney for the Government or on its own motion, shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine whether he should be released. If, after the hearing, the court finds by the standard specified in subsection (d) that the person has recovered from his mental disease or defect to such an extent that—

(1) his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall order that he be immediately discharged; or

(2) his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would no longer create a substantial risk of bodily injury to another person or serious damage ~~to~~ property of another, the court shall—

(A) order that he be conditionally discharged under a prescribed regimen of medical, psychiatric, or psychological care or treatment that has been prepared for him, that has been certified to the court as appropriate by the director of the facility in which he is committed, and that has been found by the court to be appropriate; and

(B) order, as an explicit condition of release, that he comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment.

The court at any time may, after a hearing employing the same criteria, modify or eliminate the regimen of medical, psychiatric, or psychological care or treatment.

(g) Revocation of conditional discharge.—The director of a medical facility responsible for administering a regimen imposed on an acquitted person conditionally discharged under subsection (f) shall notify the Attorney General and the court having jurisdiction over the person of any failure of the person to comply with the regimen. Upon such notice, or upon other probable cause to believe that the person has failed to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, the person may be arrested, and, upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him. The court shall, after a hearing, determine whether the person should be remanded to a suitable facility on the ground that, in light of his failure to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, his continued release would create a substantial risk of bodily injury to another person or serious damage to property of another.

(h) Limitations on furloughs.—An individual who is hospitalized under subsection (e) of this section after being found not guilty only by reason of insanity of an offense for which subsection (d) of this section creates a burden of proof of clear and convincing evidence, may leave temporarily the premises of the facility in which that individual is hospitalized only—

(1) with the approval of the committing court, upon notice to the attorney for the Government and such individual, and after opportunity for a hearing;

(2) in an emergency; or

(3) when accompanied by a Federal law enforcement officer (as defined in section 115 of this title).

(As amended Pub.L. 98-473, Title II, § 403(a), Oct. 12, 1984, 98 Stat. 2059; Pub.L. 100-690, Title VII, § 7043, Nov. 18, 1988, 102 Stat. 4400.)

§ 4244. Hospitalization of a convicted person suffering from mental disease or defect

(a) Motion to determine present mental condition of convicted defendant.—A defendant found guilty of an offense, or the attorney for the Government, may, within ten days after the defendant is found guilty, and prior to the time the defendant is sentenced, file a motion for a hearing on the present mental condition of the defendant if the motion is supported by substantial information indicating that the defendant may presently be suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility. The court shall grant the motion, or at any time prior to the sentencing of the defendant shall order such a hearing on its own motion, if it is of the opinion that there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility.

(b) Psychiatric or psychological examination and report.—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c). In addition to the information required to be included in the psychiatric or psychological report pursuant to the provisions of section 4247(c), if the report includes an opinion by the examiners that the defendant is presently suffering from a mental disease or defect but that it is not such as to require his custody for care or treatment in a suitable facility, the report shall also include an opinion by the examiner concerning the sentencing alternatives that could best accord the defendant the kind of treatment he does need.

(c) Hearing.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) Determination and disposition.—If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect and that he should, in lieu of being sentenced to imprisonment, be committed to a suitable facility for care or treatment, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for care or treatment in a suitable facility. Such a commitment constitutes a provisional sentence of imprisonment to the maximum term authorized by law for the offense for which the defendant was found guilty.

(e) Discharge.—When the director of the facility in which the defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered from his mental disease or defect to such an extent that he is no longer in need of custody for care or treatment in such a facility, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the Government. If, at the time of the filing of the certificate, the provisional sentence imposed pursuant to subsection (d) has not expired, the court shall proceed finally to sentencing and may modify the provisional sentence.

(Added Sept. 7, 1949, c. 535, § 1, 63 Stat. 686, and amended Oct. 12, 1984, Pub.L. 98-473, Title II, § 403(a), 98 Stat. 2061.)

§ 4245. Hospitalization of an imprisoned person suffering from mental disease or defect

(a) Motion to determine present mental condition of imprisoned person.—If a person serving a sentence of imprisonment objects either in writing or through his attorney to being transferred to a suitable facility for care or treatment, an attorney for the Government, at the request of the director of the facility in which the person

is imprisoned, may file a motion with the court for the district in which the facility is located for a hearing on the present mental condition of the person. The court shall grant the motion if there is reasonable cause to believe that the person may presently be suffering from a mental disease or defect or the treatment of which he is in need of custody for care or treatment in a suitable facility. A motion filed under this subsection shall stay the transfer of the person pending completion of procedures contained in this section.

(b) Psychiatric or psychological examination and report.—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the person may be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(c) Hearing.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) Determination and disposition.—If, after the hearing, the court finds by a preponderance of the evidence that the person is presently suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility, the court shall commit the person to the custody of the Attorney General. The Attorney General shall hospitalize the person for treatment in a suitable facility until he is no longer in need of such custody for care or treatment or until the expiration of the sentence of imprisonment, whichever occurs earlier.

(e) Discharge.—When the director of the facility in which the person is hospitalized pursuant to subsection (d) determines that the person has recovered from his mental disease or defect to such an extent that he is no longer in need of custody for care or treatment in such a facility, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the person's counsel and to the attorney for the Government. If, at the time of the filing of the certificate, the term of imprisonment imposed upon the person has not expired, the court shall order that the person be reimprisoned until the expiration of his sentence of imprisonment.

(Added Sept. 7, 1949, c. 535, § 1, 63 Stat. 686, and amended Oct. 12, 1984, Pub.L. 98-473, Title II, § 403 (a), 98 Stat. 2062.)

§ 4246. Hospitalization of a person due for release but suffering from mental disease or defect

(a) Institution of proceeding.—If the director of a facility in which a person is hospitalized certifies that a person whose sentence is about to expire, or who has been committed to the custody of the Attorney General pursuant to section 4241(d), or against whom all criminal charges have been dismissed solely for reasons related to the mental condition of the person, is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, and that suitable arrangements for State custody and care of the person are not available, he shall transmit the certificate to the clerk of the court for the district in which the person is confined. The clerk shall send a copy of the certificate to the person, and to the attorney for the Government, and, if the person was committed pursuant to section 4241(d), to the clerk of the court that ordered the commitment. The court shall order a hearing to determine whether the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another. A certificate filed under this subsection shall stay the release of the person pending completion of procedures contained in this section.

(b) Psychiatric or psychological examination and report.—Prior to the date of the hearing, the court may

order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(c) Hearing.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) Determination and disposition.—If, after the hearing, the court finds by clear and convincing evidence that the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall hospitalize the person for treatment in a suitable facility, until—

(1) such a State will assume each responsibility; or

(2) the person's mental condition is such that his release, or his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would not create a substantial risk of bodily injury to another person or serious damage to property of another;

whichever is earlier. The Attorney General shall continue periodically to exert all reasonable efforts to cause such a State to assume such responsibility for the person's custody, care, and treatment.

(e) Discharge.—When the director of the facility in which a person is hospitalized pursuant to subsection (d) determines that the person has recovered from his mental disease or defect to such an extent that his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the person's counsel and to the attorney for the Government. The court shall order the discharge of the person or, on the motion of the attorney for the Government or on its own motion, shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine whether he should be released. If, after the hearing, the court finds by a preponderance of the evidence that the person has recovered from his mental disease or defect to such an extent that—

(1) his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall order that he be immediately discharged; or

(2) his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall—

(A) order that he be conditionally discharged under a prescribed regimen of medical, psychiatric, or psychological care or treatment that has been prepared for him that has been certified to the court as appropriate by the director of the facility in which he is committed, and that has been found by the court to be appropriate; and

(B) order, as an explicit condition of release, that he comply with the prescribed regi-

men of medical, psychiatric, or psychological care or treatment.

The court any any time may, after a hearing employing the same criteria, modify or eliminate the regimen of medical, psychiatric, or psychological care or treatment.

(f) Revocation of conditional discharge.—The director of a medical facility responsible for administering a regimen imposed on a person conditionally discharged under subsection (e) shall notify the Attorney General and the court having jurisdiction over the person of any failure of the person to comply with the regimen. Upon such notice, or upon other probable cause to believe that the person has failed to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, the person may be arrested, and, upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him. The court shall, after a hearing, determine whether the person should be remanded to a suitable facility on the ground that, in light of his failure to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, his continued release would create a substantial risk of bodily injury to another person or serious damage to property of another.

(g) Release to state of certain other persons.—If the director of a facility in which a person is hospitalized pursuant to this chapter certifies to the Attorney General that a person, against whom all charges have been dismissed for reasons not related to the mental condition of the person, is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, the Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried for the purpose of institution of State proceedings for civil commitment. If neither such State will assume such responsibility, the Attorney General shall release the person upon

receipt of notice from the State that it will not assume such responsibility, but not later than ten days after certification by the director of the facility.

(Added Sept. 7, 1949, c. 535, § 1, 63 Stat. 686, and amended Oct. 12, 1984, Pub.L. 98-473, Title II, §403(a), 98 Stat. 2062; Nov. 29, 1990, Pub.L. 101-647, Title XXXV, § 3599D, 104 Stat. 4932.)

§ 4247. General provisions for chapter

(a) Definitions.—As used in this chapter—

(1) "rehabilitation program" includes—

(A) basic educational training that will assist the individual in understanding the society to which he will return and that will assist him in understanding the magnitude of his offense and its impact on society;

(B) vocational training that will assist the individual in contributing to, and in participating in, the society to which he will return;

(C) drug, alcohol, and other treatment programs that will assist the individual in overcoming his psychological or physical dependence; and

(D) organized physical sports and recreation programs; and

(2) "suitable facility" means a facility that is suitable to provide care or treatment given the nature of the offense and the characteristics of the defendant.

(b) Psychiatric or psychological examination.—A psychiatric or psychological examination ordered pursuant to this chapter shall be conducted by a licensed or certified psychiatrist or psychologist, or, if the court finds it appropriate, by more than one such examiner. Each examiner

shall be designated by the court, except that if the examination is ordered under section 4245 or 4246, upon the request of the defendant an additional examiner may be selected by the defendant. For the purposes of an examination pursuant to an order under section 4241, 4244, or 4245, the court may commit the person to be examined for a reasonable period, but not to exceed thirty days, and under section 4242, 4243, or 4246, for a reasonable period, but not to exceed forty-five days, to the custody of the Attorney General for placement in a suitable facility. Unless impracticable, the psychiatric or psychological examination shall be conducted in the suitable facility closest to the court. The director of the facility may apply for a reasonable extension, but not to exceed fifteen days under section 4241, 4244, or 4245, and not to exceed thirty days under section 4242, 4243, or 4246, upon a showing of good cause that the additional time is necessary to observe and evaluate the defendant.

(c) Psychiatric or psychological reports.—A psychiatric or psychological report ordered pursuant to this chapter shall be prepared by the examiner designated to conduct the psychiatric or psychological examination, shall be filed with the court with copies provided to the counsel for the person examined and to the attorney for the Government, and shall include—

(1) the person's history and present symptoms;

(2) a description of the psychiatric, psychological, and medical tests that were employed and their results;

(3) the examiner's findings; and

(4) the examiner's opinions as to diagnosis, prognosis, and—

(A) if the examination is ordered under section 4241, whether the person is suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense;

(B) if the examination is ordered under section 4242, whether the person was insane at the time of the offense charged;

(C) if the examination is ordered under section 4243 or 4246, whether the person is suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another;

(D) if the examination is ordered under section 4244 or 4245, whether the person is suffering from a mental disease or defect as a result of which he is in need of custody for care or treatment in a suitable facility; or

(E) if the examination is ordered as a part of a presentence investigation, any recommendation the examiner may have as to how the mental condition of the defendant should affect the sentence.

(d) Hearing.—At a hearing ordered pursuant to this chapter the person whose mental condition is the subject of the hearing shall be represented by counsel and, if he is financially unable to obtain adequate representation, counsel shall be appointed for him pursuant to section 3006A. The person shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing.

(e) Periodic report and information requirements.—(1) The director of the facility in which a person is hospitalized pursuant to—

(A) section 4241 shall prepare semiannual reports; or

(B) section 4243, 4244, 4245, or 4246 shall prepare annual reports concerning the mental condition of the person and containing recommendations concerning the need for his continued hospitalization. The reports shall be submitted to the court that ordered the person's commitment to the facility and copies of the reports shall be submitted to such other persons as the court may direct. A copy of each such report concerning a person hospitalized after the beginning of a prosecution of that person for violation of section 871, 879, or 1751 of this title shall be submitted to the Director of the United States Secret Service. Except with the prior approval of the court, the Secret Service shall not use or disclose the information in these copies for any purpose other than carrying out protective duties under section 3056(a) of this title.

(2) The director of the facility in which a person is hospitalized pursuant to section 4241, 4243, 4244, 4245, or 4246 shall inform such person of any rehabilitation programs that are available for persons hospitalized in that facility.

(f) Videotape record.—Upon written request of defense counsel, the court may order a videotape record made of the defendant's testimony or interview upon which the periodic report is based pursuant to subsection (e). Such videotape record shall be submitted to the court along with the periodic report.

(g) Habeas corpus unimpaired.—Nothing contained in section 4243 or 4246 precludes a person who is committed under either of such sections from establishing by writ of habeas corpus the illegality of his detention.

(h) Discharge.—Regardless of whether the director of the facility in which a person is hospitalized has filed

a certificate pursuant to the provisions of subsection (e) of section 4241, 4243, 4244, 4245, or 4246, counsel for the person or his legal guardian may, at any time during such person's hospitalization, file with the court that ordered the commitment a motion for a hearing to determine whether the person should be discharged from such facility, but no such motion may be filed within one hundred and eighty days of a court determination that the person should continue to be hospitalized. A copy of the motion shall be sent to the director of the facility in which the person is hospitalized and to the attorney for the Government.

(i) Authority and responsibility of the Attorney General.—

The Attorney General—

(A) may contract with a State, a political subdivision, a locality, or a private agency for the confinement, hospitalization, care, or treatment of, or the provision of services to, a person committed to his custody pursuant to this chapter;

(B) may apply for the civil commitment, pursuant to State law, of a person committed to his custody pursuant to section 4243 or 4246;

(C) shall, before placing a person in a facility pursuant to the provisions of section 4241, 4243, 4244, 4245, or 4246, consider the suitability of the facility's rehabilitation programs in meeting the needs of the person; and

(D) shall consult with the Secretary of the Department of Health and Human Services in the general implementation of the provisions of this chapter and in the establishment of standards for facilities used in the implementation of this chapter.

(j) This chapter does not apply to a prosecution under an Act of Congress applicable exclusively to the District of Columbia or the Uniform Code of Military Justice.

(Added Sept. 7, 1949, c. 535, § 1, 63 Stat. 686, and amended Oct. 12, 1984, Pub.L. 98-473, Title II, § 403 (a), 98 Stat. 2065; Nov. 18, 1988, Pub.L. 100-690, Title VII, §§ 7044, 7047(a), 102 Stat. 4400, 4401.)

APPENDIX B

D.C. Code § 24-301

§ 24-301. Commitment during trial; restoration to competency; acquittal by reason of insanity; release after confinement; expenses of confinement; inconsistent statutes superseded; escaped persons; insanity defense; motions for relief.

(a) If it appears to a court having jurisdiction of: (1) A person arrested or indicted for, or charged by information with, an offense; or (2) a child subject to a transfer motion in the Family Division of the Superior Court of the District of Columbia pursuant to § 16-2307, that, from the court's own observations or from prima facie evidence submitted to it and prior to the imposition of sentence, the expiration of any period of probation, or the hearing on the transfer motion, as the case may be, such person or child (hereafter in this subsection and subsection (b) of this section referred to as the "accused") is of unsound mind or is mentally incompetent so as to be unable to understand the proceedings against him or properly to assist in his own defense, the court may order the accused committed to the District of Columbia General Hospital or other mental hospital designated by the court, for such reasonable period as the court may determine for examination and observation and for care and treatment if such is necessary by the psychiatric staff of said hospital. If, after such examination and observation,the superintendent of the hospital, in the case of a mental hospital, or the chief psychiatrist of the District of Columbia General Hospital, in the case of District of Columbia General Hospital, shall report that in his opinion the accused is of unsound mind or mentally incompetent, such report shall be sufficient to authorize the court to commit by order the accused to a hospital for the mentally ill unless the accused or the government objects, in which event the court, after hearing without a

jury, shall make a judicial determination of the competency of the accused to stand trial or to participate in transfer proceedings. If the court shall find the accused to be then of unsound mind or mentally incompetent to stand trial or to participate in transfer proceedings, the court shall order the accused confined to a hospital for the mentally ill.

(b) Whenever an accused person confined to a hospital for the mentally ill is restored to mental competency in the opinion of the superintendent of said hospital, the superintendent shall certify such fact to the clerk of the court in which the indictment, information, or charge against the accused is pending and such certification shall be sufficient to authorize the court to enter an order thereon adjudicating him to be competent to stand trial or to participate in transfer proceedings, unless the accused or the government objects, in which event, the court, after hearing without a jury, shall make a judicial determination of the competency of the accused to stand trial or to participate in transfer proceedings.

(c) When any person tried upon an indictment or information for an offense, or tried in the Family Division of the Superior Court of the District of Columbia for an offense, is acquitted solely on the ground that he was insane at the time of its commission, that fact shall be set forth by the jury in their verdict.

(d)(1) If any person tried upon an indictment or information for an offense raises the defense of insanity and is acquitted solely on the ground that he was insane at the time of its commission, he shall be committed to a hospital for the mentally ill until such time as he is eligible for release pursuant to this subsection or subsection (e) of this section.

(2)(A) A person confined pursuant to paragraph (1) of this subsection shall have a hearing, unless waived, within 50 days of his confinement to determine whether

he is entitled to release from custody. At the conclusion of the criminal action referred to in paragraph (1) of this subsection, the court shall provide such person with representation by counsel:

(i) In the case of a person who is eligible to have counsel appointed by the court, by continuing any appointment of counsel made to represent such person in the prior criminal action or by appointing new counsel; or

(ii) In the case of a person who is not eligible to have counsel appointed by the court, by assuring representation by retained counsel.

(B) If the hearing is not waived, the court shall cause notice of the hearing to be served upon the person, his counsel, and the prosecuting attorney and hold the hearing. Within 10 days from the date the hearing was begun, the court shall determine the issues and make findings of fact and conclusions of law with respect thereto. The person confined shall have the burden of proof. If the court finds by a preponderance of the evidence that the person confined is entitled to his release from custody, either conditional or unconditional, the court shall enter such order as may appear appropriate.

(3) An appeal may be taken from an order entered upon paragraph (2) of this subsection to the court having jurisdiction to review final judgments of the court entering the order.

(e) Where any person has been confined in a hospital for the mentally ill pursuant to subsection (d) of this section, and the superintendent of such hospital certifies: (1) That such person has recovered his sanity; (2) that, in the opinion of the superintendent, such person will not in the reasonable future be dangerous to himself or others; and (3) in the opinion of the superintendent, the person is entitled to his unconditional release from the hospital, and such certificate is filed with the clerk of

the court in which the person was tried, and a copy thereof served on the United States Attorney or the Corporation Counsel of the District of Columbia, whichever office prosecuted the accused, such certificate shall be sufficient to authorize the court to order the unconditional release of the person so confined from further hospitalization at the expiration of 15 days from the time said certificate was filed and served as above; but the court in its discretion may, or upon objection of the United States or the District of Columbia shall, after due notice, hold a hearing at which evidence as to the mental condition of the person so confined may be submitted, including the testimony of 1 or more psychiatrists from said hospital. The court shall weigh the evidence and, if the court finds that such person has recovered his sanity and will not in the reasonable future be dangerous to himself or others, the court shall order such person unconditionally released from further confinement in said hospital. If the court does not so find, the court shall order such person returned to said hospital. Where, in the judgment of the superintendent of such hospital, a person confined under subsection (d) of this section is not in such condition as to warrant his unconditional release, but is in a condition to be conditionally released under supervision, and such certificate is filed and served as above provided, such certificate shall be sufficient to authorize the court to order the release of such person under such conditions as the court shall see fit at the expiration of 15 days from the time such certificate is filed and served pursuant to this section: Provided, that the provisions as to hearing prior to unconditional release shall also apply to conditional releases, and, if, after hearing and weighing the evidence, the court shall find that the condition of such person warrants his conditional release, the court shall order his release under such conditions as the court shall see fit, or, if the court does not so find, the court shall order such person returned to such hospital.

(f) When an accused person shall be acquitted solely on the ground of insanity and ordered confined in a hospital for the mentally ill, such person and his estate shall be charged with the expense of his support in such hospital.

(g) Nothing herein contained shall preclude a person confined under the authority of this section from establishing his eligibility for release under the provisions of this section by a writ of habeas corpus.

(h) The provisions of this section shall supersede in the District of Columbia the provisions of any federal statutes or parts thereof inconsistent with this section.

(i) When a person has been ordered confined in a hospital for the mentally ill pursuant to this section and has escaped from such hospital, the court which ordered confinement shall, upon request of the government, order the return of the escaped person to such hospital. The return order shall be effective throughout the United States. Any federal judicial officer within whose jurisdiction the escaped person shall be found shall, upon receipt of the return order issued by the committing court, cause such person to be apprehended and delivered up for return to such hospital.

(j) Insanity shall not be a defense in any criminal proceeding in the United States District Court for the District of Columbia or in the Superior Court of the District of Columbia, unless the accused or his attorney in such proceeding, at the time the accused enters his plea of not guilty or within 15 days thereafter or at such later time as the court may for good cause permit, files with the court and serves upon the prosecuting attorney writen notice of his intention to rely on such defense. No person accused of an offense shall be acquitted on the ground that he was insane at the time of its commission unless his insanity, regardless of who raises the issue, is affirmatively established by a preponderance of the evidence.

(k)(1) A person in custody or conditionally released from custody, pursuant to the provisions of this section, claiming the right to be released from custody, the right to any change in the conditions of his release, or other relief concerning his custody, may move the court having jurisdiction to order his release, to release him from custody, to change the conditions of his release, or to grant other relief.

(2) A motion for relief may be made at any time after a hearing has been held or waived pursuant to subsection (d)(2) of this section.

(3) Unless the moton and the files and records of the case conclusively show that the person is entitled to no relief, the court shall cause notice thereof to be served upon the prosecuting authority, grant a prompt hearing thereon, determine the issues, and make findings of fact and conclusions of law with respect thereto. On all issues raised by his motion, the person shall have the burden of proof. If the court finds by a preponderance of the evidence that the person is entitled to his release from custody, either conditional or unconditional, a change in the conditions of his release, or other relief, the court shall enter such order as may appear appropriate.

(4) A court may entertain and determine the motion without requiring the production of the persons at the hearing.

(5) A court shall not be required to entertain a 2nd or successive motion for relief under this section more often than once every 6 months. A court for good cause shown may in its discretion entertain such a motion more often than once every 6 months.

(6) An appeal may be taken from an order entered under this section to the court having jurisdiction to review final judgments of the court entering the order.

(7) An application for habeas corpus on behalf of a person who is authorized to apply for relief by motion

pursuant to this section shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court having jurisdiction to entertain a motion pursuant to this section, unless it also appears that the remedy by motion is inadequate or ineffective to test the validity of his detention. (Mar. 3, 1901, 31 Stat. 1340, ch. 854, § 927; Apr. 14, 1906, 34 Stat. 113, ch. 1624; July 2, 1945, 59 Stat. 311, ch. 217; Aug. 9, 1955, 69 Stat. 609, ch. 673, § 1; Dec. 27, 1967, 81 Stat. 735, Pub. L. 90-226, title II, § 201; July 29, 1970, 84 Stat. 570, Pub. L. 91-358, title I, §§ 155(a), 159(e), title II, § 207; 1973 Ed., § 24-301.)

APPENDIX C

Senate Report. No. 98-225, 98th Cong., 1st Session 240 (1983), reprinted 1984 U.S. Code Cong. & Adm. News 3182, 3406, 3422

[page 224]

* * * *

After numerous appellate opinions, refining, clarifying, expanding, and limiting *Durham* over a period of eighteen years, the District of Columbia circuit overruled it in *United States v. Brawner.*[8]

Meanwhile, the other Federal courts of appeals, with some modifications and hesitations, had moved from M'Naghten and its volitional modification to the proposal of the American Law Institute's Model Penal Code, which provides that "[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to appreciate the criminality of his conduct or to conform to the requirtments of law."[9] Adoption of the A.L.I. formulation marks the fourth and latest stage of development of Federal decisional law on the subject, although minor differences among the circuits continue to exist.[10] In the Brawner case, supra, the District of Columbia joined the other circuits in embracing this approach.

* * * *

[8] 471 F.2d 969 (D.C. Cir. 1972). See generally *Symposium on United States v. Brawner,* 1973 Wash. U.L.Q. 17-54.

[9] Model Penal Code, § 4.01 (P.O.D. 1962).

[10] The positions of the various circuits are surveyed in *United States v. Brawner, supra* note 8 at 979-981. The most notable departure from uniformity is the Third Circuit, where the court eliminated the cognitive aspect of the A.L.I. test. See *United States v. Currens,* 290 F.2d 751 (3d Cir. 1961); cf. *Government of Virgin Islands v. Bellott,* 495 F.2d 1393 (3d Cir. 1974).

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* * * *

As heretofore stated, the Federal law generally contains no provision for a verdict of not guilty by reason of insanity.[67] To cure the problems that this lack creates, section 4242(b) provides that where the issue of insanity is raised, the jury is to be instructed to find, or, in the event of a non-jury trial, the court is to find, the defendant (1) guilty; (2) not guilty; or (3) not guilty only by reason of insanity.

The Committee endorses the procedure used in the District of Columbia whereby the jury, in a case in which the insanity defense has been raised, may be instructed on the effect of a verdict of not guilty by reason of insanity.[68] If the defendant requests that the instruction not be given, it is within the discretion of the court whether to give it or not.[69]

* * * *

[67] It should be noted that the District of Columbia Code, section 24-301(c), provides that the jury must state in its verdict if acquittal was solely on the grounds that the defendant was insane at the time of the commission of the offense. See also Criminal Jury Instructions for the District of Columbia, Instructions 5.07 and 5.11 (1972).

[68] See also *United States v. McCracken, supra* note 59 at 418-421. Compare Instruction 5.11 of the Criminal Jury Instructions for the District of Columbia (1972), which states: "If the defendant is found not guilty by reason of insanity, it becomes the duty of the court to commit him to St. Elizabeths Hospital. There will be a hearing within 50 days to determine whether the defendant will remain in custody, and will be entitled to release from custody only if the court finds by a preponderance of the evidence that he is not likely to injure himself or other persons due to mental illness."

[69] *United States v. Brawner, supra* note 8. [Note 8 is found on the previous page of this Appendix.]

APPENDIX D

D.C. Circuit Pattern Jury Instruction
5.07 & 5.11 (3rd Ed. 1978)

Instruction 5.07

INSANITY

Alternative A:

The defendant in this case asserts the defense of insanity.

You are not to consider this defense unless you have first found that the Government has proved beyond a reasonable doubt each essential element of the offense. One of these elements is the requirement [of premeditation and deliberation for first degree murder] [of specific intent for ————————————], on which you have already been instructed. In determining whether that requirement has been proved beyond a reasonable doubt you may consider the testimony as to the defendant's abnormal mental condition.

If you find that the Government has failed to prove beyond a reasonable doubt any one or more of the essential elements of the offense, you must find the defendant not guilty, and you should not consider any possible verdict relating to insanity.

If you find that the Government has proved each essential element of the offense beyond a reasonable doubt, then you must consider whether to bring in a verdict of not guilty by reason of insanity.

The law provides that a jury bring in a verdict of not guilty by reason of insanity if, at the time of the criminal conduct, the defendant, as a result of mental disease or defect, either lacked substantial capacity to conform his conduct to the requirements of the law, or lacked substantial capacity to appreciate the wrongfulness of his conduct.

Every man is presumed to be sane, that is, to be without mental disease or defect, and to be responsible for his acts. But that presumption no longer controls when evidence is introduced that he may have a mental disease or defect.

The term insanity does not require a showing that the defendant was disoriented as to time or place.

Mental disease [or defect] includes any abnormal condition of the mind, regardless of its medical label, which substantially affects mental or emotional processes and substantially impairs behavior controls. The term "behavior controls" refers to the processes and capacity of a person to regulate and control his conduct and his actions.

In considering whether the defendant had a mental disease [or defect] at the time of the unlawful act with which he is charged, you may consider testimony in this case concerning the development, adaptation and functioning of these mental and emotional processes and behavior controls.

[The term "mental disease" differs from "mental defect" in that the former is a condition which is either capable of improving or deteriorating, while the latter is a condition not capable of improving or deteriorating.]

(Burden of proof—alternative versions:)

(a) [The burden of proof is on the defendant to establish by a preponderance of the evidence that, as a result of mental disease or defect, he either lacked substantial capable of improving or deteriorating, while the latter the law or lacked substantial capacity to appreciate the wrongfulness of his conduct. If the defendant has met that burden you shall bring in a verdict of not guilty by reason of insanity. If he has not met that burden you shall bring in a verdict of guilty of the offenses you found proved beyond a reasonable doubt.]

(b) [The burden is on the Government to prove beyond a reasonable doubt either that the defendant was not suffering from a mental disease or defect, or else that he nevertheless had substantial capacity both to conform his conduct to the requirements of the law and to appreciate the wrongfulness of his conduct. If the Government has not established this beyond a reasonable doubt, you shall bring in a verdict of not guilty by reason of insanity.]

Alternative B:

The defendant in this case asserts the defense of insanity.

If you find that the Government has proved beyond a reasonable doubt each essential element of the offense, you must then consider the evidence as to the defendant's insanity. If you find that the Government has failed to prove beyond a reasonable doubt each essential element of the offense, you must find the defendant not guilty and you need not consider the evidence as to the defendant's insanity.

The law provides that a defendant is not criminally responsible if, at the time of his criminal conduct, and as a result of mental disease or defect, he either lacks substantial capacity to conform his conduct to the requirements of the law, or lacks substantial capacity to recognize the wrongfulness of his conduct.

Every man is presumed to be sane, that is, to be without mental disease or defect, and to be responsible for his acts. But that presumption no longer controls when the defendant establishes by a preponderance of the evidence that he has a mental disease or defect.

Mental disease [or defect] includes any abnormal condition of the mind, regardless of its medical label, which substantially affects mental or emotional processes and substantially impairs behavior controls. An abnormality

which is manifested only by a defendant's repeated criminal or otherwise anti-social conduct is not a mental disease or defect as the court has defined it to you.

The term "behavior controls" refers to the process and capacity of a person to regulate and control his conduct and his actions. In considering whether the defendant had a mental disease [or defect] at the time of the unlawful conduct with which he is charged, you may consider testimony in this case concerning the development, adaptation and functioning of these mental and emotional processes and behavior controls. [The term "mental disease" differs from "mental defect" in that the former is a condition which is either capable of improving or deteriorating, while the latter is a condition not capable of improving or deteriorating.]

The fact that the defendant had a mental disease [or defect] at the time of the unlawful act would not alone be sufficient to relieve him of the responsibility for the crime. There must be a causal relationship between the disease [or defect] and the unlawful act. The relationship between the disease [or defect] and the act must be substantial in its effect with respect to the act. That is, the disease [or defect] must have had a significant impact on the doing or not doing of the act.

The court emphasizes that regardless of the nature and extent of the experts' testimony in the case, the issue of whether the defendant is criminally responsible remains at all times a question to be resolved by the jury and not by the experts. It is for you alone to determine the existence, if any, of a mental disease or defect in the defendant, whether such a disability resulted in a substantial impairment of the defendant's capacity to obey the law, and whether, therefore, there existed a sufficient relationship between the mental abnormality and the criminal conduct with which the defendant was charged to warrant a conclusion that he should not be held responsible for his acts.

You must therefore first determine whether the Government has established beyond a reasonable doubt that the defendant committed the acts constituting the alleged offenses. If the government has failed to prove beyond a reasonable doubt any element of the offense[s] alleged in the indictment, then you must find the defendant not guilty, and you may not consider the defense of insanity. However, if you find beyond a reasonable doubt that the defendant has committed each element of the offense[s] charged in the indictment, then you must go on to determine whether the defendant is not guilty by reason of insanity.

In order to find that the defendant is not guilty by reason of insanity, you must be satisfied that he has established by a preponderance of the evidence that, as a result of a mental disease or defect, he either lacks substantial capacity to conform his conduct to the requirements of the law, or lacks substantial capacity to recognize the wrongfulness of his conduct. If the defendant has met that burden, you must find him not guilty by reason of insanity. On the other hand, if he has not met that burden, it is your duty to find the defendant guilty of those offenses you have found proved beyond a reasonable doubt.

By a preponderance of the evidence is meant such evidence as, when weighed against that opposed to it, has the more convincing force. To establish by a preponderance of the evidence is to prove that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has the more convincing force and produces in your mind a belief that what is sought to be proved is more likely true than not true. If, however, you believe that the evidence on the issue of insanity is evenly balanced, then your findings on that issue must be against the defendant.

The defendant is not required to prove his insanity beyond a reasonable doubt. The defendant has succeeded

in carrying the burden of proof by a preponderance on the issue of insanity if, after consideration of all the evidence in the case, the evidence favoring his side of the issue is more convincing to you, and causes you to believe that on that issue the possibility of truth favors him.

Comment: As in the 1972 Edition, the Committee has published two alternative instructions on insanity. *Alternative A* remains unchanged from the 1972 Edition and conforms with the "suggestion for instruction on insanity" published as an appendix to the opinion of the United States Court of Appeals in *United States v. Brawner*, 153 U.S. App. D.C. 1, 471 F.2d 969 (1972) (*en banc*).

* * * *

Instruction 5.11

EFFECT OF A FINDING OF NOT GUILTY BY REASON OF INSANITY

If the defendant is found not guilty by reason of insanity it becomes the duty of the court to commit him to St. Elizabeths Hospital. There will be a hearing within 50 days to determine whether the defendant is entitled to release. In that hearing the defendant has the burden of proof. The defendant will remain in custody, and will be entitled to release from custody only if the court finds by a preponderance of the evidence that he is not likely to injure himself or other persons due to mental illness.

APPENDIX E

D.C. Circuit Pattern Jury Instruction 5.07 & 5.10 (4th Ed. 1993)

Instruction 5.07

INSANITY

Alternative A:

The defendant asserts the defense of insanity. If you find that the government has failed to prove beyond a reasonable doubt each essential element of the offense, you must find the defendant not guilty and you need not consider the evidence as to the defendant's insanity. If you find that the government has proved beyond a reasonable doubt each essential element of the offense, you must then consider the evidence as to the defendant's insanity.

A defendant is not guilty by reason of insanity if, at the time of his/her criminal conduct, and as a result of mental disease [or defect], s/he either lacked substantial capacity to conform his/her conduct to the requirements of the law, or lacked substantial capacity to recognize the wrongfulness of his/her conduct.

Mental disease [or defect] includes any abnormal condition of the mind, regardless of its medical label, which affects mental or emotional processes and substantially impairs behavior controls. The term "behavior controls" refers to a person's ability to regulate and control his/her conduct. [The term "mental disease" is a condition which is capable of either improving or deteriorating; the term "mental defect" is a condition not capable of improving or deteriorating.]

In considering whether the defendant had a mental disease [or defect] at the time of the alleged offense, you

may consider any evidence about the development, adaptation and functioning of the defendant's mental and emotional processes and behavior controls. The defendant need not show that s/he was disoriented as to time or place.

An abnormality manifested only by repeated criminal or otherwise anti-social conduct is not a mental disease or defect.

The defendant must prove not only that s/he had a mental disease [or defect], but also that there was a causal relation between the disease or defect and the unlawlful act. That relationship must be substantial. In other words, the disease [or defect] must have had a significant impact on the defendant's committing the unlawful act.

Regardless of the nature and extent of the experts' testimony in the case, the issue of whether the defendant is criminally responsible remains at all times a question to be resolved by you, not by the experts. You, not the experts, decide whether the defendant had a mental disease [or defect]. You decide whether that disability substantially impaired his/her capacity to obey the law. And you therefore decide whether that disability was sufficiently related to the alleged criminal conduct for you to conclude that the defendant should not be held responsible for his/her unlawful act.

The defendant has the burden of proving that, as a result of mental disease or defect, s/he either lacked substantial capacity to conform his/her conduct to the requirements of the law or lacked substantial capacity to appreciate the wrongfulness of his/her conduct. The defendant is not required to prove this defense of insanity beyond a reasonable doubt. S/he is required to prove it by a preponderance of the evidence. This means that, after considering all of the evidence, you must decide whether you believe it is more likely than not that the defendant is not guilty by reason of insanity.

Consider all the evidence in evaluating the defense of insanity. If the defendant has met his/her burden of proof, you must find him/her not guilty by reason of insanity. If s/he has not met that burden, it is your duty to find the defendant guilty of those offenses you have found proven beyond a reasonable doubt.

Alternative B:

The defendant asserts the defense of insanity. If you find that the government has failed to prove beyond a reasonable doubt each essential element of the offense, you must find the defendant not guilty and you need not consider the evidence as to the defendant's insanity. If you find that the government has proved beyond a reasonable doubt each essential element of the offense, you must then consider the evidence as to the defendant's insanity.

A defendant is not guilty by reason of insanity if, as a result of a severe mental disease or defect, the defendant is unable, at the time of the criminal conduct, to appreciate either the nature and quality or the wrongfulness of his/her actions.

Mental disease [or defect] includes any severe abnormal condition of the mind, which substantially affects mental or emotional processes. [The term "mental disease" is a condition which is capable of either improving or deteriorating; the term "mental defect" is a condition not capable of improving or deteriorating.]

The defendant need not show that s/he was disoriented as to time or place.

An abnormality manifested only by repeated criminal or otherwise anti-social conduct is not a severe mental disease or defect.

The defendant must prove not only that s/he had a severe mental disease [or defect], but also that there was a causal relation between the disease or defect and the

unlawful act. That relationship must be substantial. In other words, the disease [or defect] must have had a significant impact on the defendant's committing the unlawful act.

Regardless of the nature and extent of the experts' testimony in the case, the issue of whether the defendant is criminally responsible remains at all times a question to be resolved by you, not by the experts. You, not the experts, decide whether the defendant had a severe mental disease [or defect]. [You decide whether that disability substantially impaired his/her capacity to obey the law.] And you therefore decide whether that disability was sufficiently related to the alleged criminal conduct for you to conclude that the defendant should not be held responsible for his/her unlawful act.

The defendant has the burden of proving that, as a result of a severe mental disease or defect, s/he was unable to appreciate the nature and quality or the wrongfulness of his/her conduct. The defendant is not required to prove this defense of insanity beyond a reasonable doubt. S/he is required to prove it by clear and convincing evidence. That is, the defendant must show it is highly probable that as a result of severe mental disease or defect s/he was unable to appreciate the nature and quality or the wrongfulness of his/her conduct.

Consider all the evidence in evaluating the defense of insanity. If the defendant has met his/her burden of proof, you must find him/her not guilty by reason of insanity. If s/he has not met that burden, it is your duty to find the defendant guilty of those offenses you have found proven beyond a reasonable doubt.

Instruction 5.10

[Instruction 5.11 in 1978 Edition]

EFFECT OF A FINDING OF NOT GUILTY BY REASON OF INSANITY

Alaternative A (Superior Court):

If the defendant is found not guilty by reason of insanity, it becomes the duty of the court to commit him to St. Elizabeths Hospital. There will be a hearing within 50 days to determine whether the defendant is entitled to release from custody. In that hearing, the defendant has the burden of proof. The defendant will remain in custody, and will be entitled to release from custody only if the court finds by a preponderance of the evidence that he is not likely to injure himself or other persons due to mental illness.

Alternative B (District Court):

If the defendant is found not guilty by reason of insanity, it becomes the duty of the court to commit him to a mental institution. There will be a hearing held within 40 days to determine whether the defendant is entitled to release from custody. In that hearing, the defendant will have the burden of proof. The defendant will remain in custody and will be entitled to release from custody if the court finds by clear and convincing evidence that his release would not create a substantial risk of bodily injury to another person or serious damage to the property of another person due to a present mental disease or defect.

Comment: **This instruction modifies Instruction 5.11 in the 1978 edition. Because of changes in federal law, it has been necessary to create Alternative A and Alternative B. Alternative A is to be used in cases tried in the D.C. Superior Court. It conforms with the provisions of D.C. Code § 24-301(d) which require the commitment of a defendant found not guilty by reason of insanity to**

St. Elizabeths Hospital, a hearing within 50 days to determine suitability for release, and other provisions pertaining to the defendant's continued custody following an NGI verdict. Alternative B should be given in cases tried in the United States District Court. This is necessitated because of changes effected in 1984 in federal law regarding post-NGI commitments. *See* 18 U.S.C. § 4243 (1984), providing for hospitalization of persons found not guilty by reason of insanity; *United States v. Neavill*, 868 F.2d 1000, 1004-05 (8th Cir. 1989).

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APPENDIX F

Sixth Circuit Pattern Instruction 6.04

SIXTH CIRCUIT PATTERN INSTRUCTION 6.04

If you find the defendant not guilty because of insanity, then it will be my duty to send him to a suitable institution. He will only be released from custody if he proves by clear and convincing evidence that his release would not create a substantial risk that he might injure someone or seriously damage someone's property.

APPENDIX G

1 Federal Criminal Jury Instructions (2nd Ed. 1991) No. 3.60B

3.60B

DISPOSITION; INFORMATION REGARDING INSANITY ACQUITTAL

Your job is to decide whether the defendant is guilty, not guilty, or not guilty only by reason of insanity. [of each of the crimes charged]. If you decide that the defendant is guilty, my job is to decide what (his) (her) punishment will be. If you decide that (he) (she) is not guilty by reason of insanity, then within the next 40 days there will be a hearing to decide what happens to the defendant next. The defendant will be released only if (he) (she) proves that (his) (her) release will not create a substantial risk of bodily injury to another person or a substantial risk of serious property damage. If the defendant fails to prove that (his) (her) release will create no such risks then (he) (she) will be held in a treatment facility until a judge is satisfied that the defendant's release no longer creates such risks.

Whatever you decide—guilty, not guilty, or not guilty only by reason of insanity—you should make that decision on the evidence at this trial. You must not be influenced by what will happen to the defendant next.

APPENDIX H

Modern Federal Jury Instructions ¶ 8.09 Instruction 8-10

§ 8.09. Insanity

Instruction 8-10
Insanity

You have heard evidence tending to show that the defendant was insane at the time that the crime was committed. The government has offered evidence tending to show that he was sane. The burden of proof is on the defendant to prove by clear and convincing evidence that he was insane at the time of the offense.

Under the law, a defendant is not guilty if he was insane when the crime was committed. The law defines insanity to mean that a person is not responsible for criminal conduct if at the time of such conduct, as a result of a severe mental disease or defect, he was unable to appreciate the nature and quality or wrongfulness of his acts.

When I speak about a mental defect, I do not refer to any particular medical term. (By the same token, the mere fact that a person may repeatedly engage in criminal conduct does not, in and of itself, justify a finding that he is insane.) [Footnote omitted.]

(*Optional:* If you find the defendant not guilty because of insanity, then it will be my duty to send him to a suitable institution. He will remain in that institution until he proves in court that his release would not create a substantial risk that he might injure someone or seriously damage someone's property.)